

FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Border Protection v Singh [2016] FCAFC 183

Appeal from: *Singh v Minister for Immigration & Anor* [2016] FCCA 2464

File number: VID 1202 of 2016

Judges: **KENNY, PERRAM AND MORTIMER JJ**

Date of judgment: 19 December 2016

Catchwords: **MIGRATION** – procedural fairness – certificate issued under s 375A of the *Migration Act 1958* (Cth) – whether Tribunal required to disclose existence of certificate

Legislation: *Migration Act 1958* (Cth) ss 5, 51A, 357A, 359A, 375A, 360, 422B, 425 and 438
Migration Legislation Amendment (Procedural Fairness) Act 2002 (Cth)

Cases cited: *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88
Arora v Minister for Immigration and Border Protection (2016) 238 FCR 153
Burton v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 149 FCR 20
Davis v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 686
Federal Airports Corporation v Aerolineas Argentinas (1997) 76 FCR 582
Kioa v West (1985) 159 CLR 550
Minister for Immigration and Multicultural and Indigenous Affairs v Lat (2006) 151 FCR 214
Minister for Immigration and Multicultural and Indigenous Affairs v SCAR (2003) 128 FCR 553
MZAFZ v Minister for Immigration and Border Protection [2016] FCA 1081
Plaintiff S10/2011 v Minister for Immigration and Citizenship (2012) 246 CLR 636
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355
Re Adams and the Tax Agents' Board (1976) 7 ATR 87
Russell v Duke of Norfolk [1949] 1 All E.R. 109

Saeed v Minister for Immigration and Citizenship (2010)
241 CLR 252

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Counsel for the Second Respondent:	The Second Respondent filed a submitting notice

ORDERS

VID 1202 of 2016

BETWEEN: **MINISTER FOR IMMIGRATION AND BORDER
PROTECTION**
Appellant

AND: **AVTAR SINGH**
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

JUDGES: **KENNY, PERRAM AND MORTIMER JJ**

DATE OF ORDER: **19 DECEMBER 2016**

THE COURT ORDERS THAT:

1. 1. The appeal be dismissed.
2. 2. The appellant pay the first respondent's costs of the appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1. 1. Introduction

1 1 The Migration and Refugee Division of the Administrative Appeals Tribunal ('the Tribunal') has the function, inter alia, of determining applications for review of departmental decisions to refuse to grant most classes of visa. Mr Singh's application for a skilled visa was rejected by a delegate of the Minister within the Department, and he sought a review of that decision in the Tribunal. While the review was pending, another delegate of the Minister issued a certificate the effect of which was to place limits on what the Tribunal could disclose to Mr Singh during the course of the review proceeding. Neither the existence of this certificate, nor the legal limitations to which it gave rise, were disclosed to him. In due course, Mr Singh's review application was rejected by the Tribunal, which affirmed the earlier departmental decision to refuse to grant him the visa which he sought.

2 2 Judicial review proceedings were then commenced by him in the Federal Circuit Court. Those proceedings were successful, and that court set aside the Tribunal's decision, remitting the matter to the Tribunal to be determined according to law. The basis of its decision was that the Tribunal had failed to afford Mr Singh procedural fairness, because it had not disclosed to him the existence of the certificate.

3 3 The Minister has now appealed to this Court from the orders of the Federal Circuit Court. Because it raises issues of some importance, the appeal has been heard by a bench comprising three judges of the Court. The principal issue on the appeal is whether the Tribunal was required to disclose the existence of the certificate to Mr Singh. For the reasons which follow, we are of the view that it was, and that the conclusions of the Federal Circuit Court in this regard were correct. The Minister's appeal will, therefore, be dismissed with costs.

2. 2. Factual background

4 4 Mr Singh is a citizen of India. He applied for a Skilled (Provisional) (Class VC) (Subclass 487) visa on 15 July 2009. The relevant trade in respect of which Mr Singh sought his visa was that of motor mechanic.

One of the matters that Mr Singh was required to demonstrate to be eligible for this class of visa was that he had obtained a skills assessment from an authorised skills assessment body. Trades Recognition Australia ('TRA') is such a body. On 15 July 2009, he submitted to the Department a skills assessment provided by TRA. The skills assessment certified that he had been assessed as having the skills appropriate for a motor mechanic, and as having done the requisite amount of work experience. This assessment had been issued by TRA on the basis of a reference provided by a motor mechanic business called Alway Automotive. This reference certified that Mr Singh had done more than 900 hours of work experience with that business.

On 30 August 2012, a delegate of the Minister concluded that the reference was a bogus document within the meaning of the former s 97 (and now s 5) of the *Migration Act 1958* (Cth) ('the Act'). Consequently, Mr Singh then failed to satisfy what is known as Public Interest Criterion 4020 ('PIC4020'). Non-satisfaction of that requirement had the effect that he was not then eligible for the visa for which he had applied. The reasons why a bogus document has this effect were explained by the Full Court in *Arora v Minister for Immigration and Border Protection* (2016) 238 FCR 153 at 155 [9]-[12] and need not be repeated here. As a result of her opinion about PIC4020, the delegate refused Mr Singh's application for the visa.

On 18 September 2012, Mr Singh applied to the Tribunal for a review of this decision. This appeal concerns the steps which were then taken in the Tribunal.

On 4 June 2014, a delegate of the Minister issued a certificate to the Tribunal. It was issued in reliance upon s 375A of the Act, which provides:

375A Certain information only to be disclosed to Tribunal

(1) This section applies to a document or information if the Minister:

- (a) has certified, in writing, that the disclosure, otherwise than to the Tribunal, of any matter contained in the document, or of the information, would be contrary to the public interest for any reason specified in the certificate (other than a reason set out in paragraph 375(a) or (b)); and
- (b) has included in the certificate a statement that the document or information must only be disclosed to the Tribunal.

(2) If, pursuant to a requirement of or under this Act, the Secretary gives to the Tribunal a document or information to which this section applies:

- (a) the Secretary must notify the Tribunal in writing that this section

applies to the document or information; and

- (b) the Tribunal must do all things necessary to ensure that the document or information is not disclosed to any person other than a member of the Tribunal as constituted for the purposes of the particular review.

9 9 The certificate was addressed to the Tribunal, and was signed by a delegate of the Minister. It was in the following terms:

CERTIFICATE AND NOTIFICATION REGARDING THE DISCLOSURE OF CERTAIN INFORMATION ONLY TO THE MIGRATION REVIEW TRIBUNAL UNDER s 375A OF THE MIGRATION ACT 1958

I certify that, in accordance with s 375A of the *Migration Act 1958*, the disclosure, otherwise than to the Migration Review Tribunal of any matter or information contained in electronic files **AFP Employer Statement AMARANTE Carmine - MRT.pdf, Amarante - Summary of Facts - MRT.pdf and Amarante - Summary of Taped Record of Interview - MRT.pdf** would be contrary to the public interest because:

- (a) The electronic files **AFP Employer Statement AMARANTE Carmine - MRT.pdf, Amarante - Summary of Facts - MRT.pdf and Amarante - Summary of Taped Record of Interview - MRT.pdf** contain third party details not relevant to this particular Merits Review.

As s 375A applies to the documents/information identified above, the MRT must do all things necessary to ensure that the document or third party information is not disclosed to any person other than to a member of the MRT as constituted for the purposes of this particular review, pursuant to s 375A(2)(b) of the *Migration Act 1958*.

(Emphasis in original.)

10 10 Section 375A(1)(a) contemplates that a certificate will specify a reason to justify the non-disclosure of the material. It will be seen that the reason put forward in the certificate was that the material in question related to ‘third party details’ which were said not to be relevant to the application before the Tribunal.

11 11 The Tribunal is also bound to provide an applicant for review with particulars of information which might form part of a decision by it to affirm the decision under review. This obligation emerges from s 359A(1) of the Act. It provides:

359A Information and invitation given in writing by Tribunal

- (1) Subject to subsections (2) and (3), the Tribunal must:
 - (a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or a part of the

reason, for affirming the decision that is under review; and

- (b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the decision that is under review; and
- (c) invite the applicant to comment on or respond to it.

12 12 There is a potential tension between s 359A and s 375A. If the Tribunal proposes to use a document or information which is subject to a s 375A certificate as part of its reasons for affirming a decision under review, s 359A appears to require the Tribunal to give an applicant particulars of that document or information which, at the same time, s 375A requires not to be disclosed.

13 13 There are conflicting views about how this apparent tension might be resolved. In *Davis v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 686 at [21] and [28], Dowsett J considered that the prohibition in s 375A on the provision of a document or information certified under it outflanked any obligation on the Tribunal under s 359A to provide particulars of that document or information. But in *Burton v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 149 FCR 20 at 31 [40], Wilcox J concluded that the provision of particulars could be done without necessarily disclosing the document or information certified under s 375A. We return to this tension later in these reasons.

14 14 In this case, the Tribunal did in fact provide particulars to Mr Singh pursuant to s 359A. It did this in two tranches. The first was by letter dated 27 June 2014. The relevant portion of the letter was in these terms:

The particulars of the information are:

- • an employment reference issued to you by Always Automotive was fraudulently produced or procured
- • the employment reference was provided by you or on your behalf to Trades Recognition Australia to obtain a positive skills assessment in your nominated occupation
- • Carmine Amarante (“Amarante”) has pleaded guilty in criminal proceedings in Victoria to the manufacture and sale of work references matching the employment reference submitted to TRA to obtain your skills assessment
- • Amarante has admitted that the work references were fraudulent in content and that they were created to assist clients to apply for permanent residence in Australia.

This information is relevant to the review because the criteria for the grant of the Skilled Graduate visa you have applied for include that there be no evidence that you have given or caused to be given to persons including the Minister a bogus document or information that is false or misleading in a material particular in relation to the visa application.

If the Tribunal relies on this information in making its decision, it may find that you do not meet this criterion for the grant of a visa and so the Tribunal may affirm the decision of the delegate to refuse to grant the visa.

You are invited to give comments on or respond to the above information in writing.

15 15 There was then a change in the composition of the Tribunal, and a second letter was sent on 27 November 2014. This letter was more detailed, but it is not necessary to set it out. Both letters called for a response from Mr Singh. On 10 December 2014, he provided a response. In it he said that he had never met Mr Amarante, that he had in fact done the work experience certified, and that it was the owner of the business who had given him the certificate.

16 16 It is not clear, and we do not need to resolve, whether these particulars touched on the material the subject of the certificate. That material was not before the Court below, and although an affidavit was filed in this Court with the material annexed to it, that affidavit was not ultimately read on the appeal. The relationship between the particulars given to Mr Singh and the certificate remains therefore opaque. No submission was made to this Court that the material subject to the certificate was irrelevant to the issues under review (as its contents might be read potentially as suggesting). Such a submission would have required, for its assessment, that the Court examine the material itself. As we have said, ultimately that material was not put before us.

17 17 Following receipt of Mr Singh's response, the Tribunal affirmed the decision under review on 9 March 2015. It did so because it concluded that Mr Singh had provided a bogus document to the delegate.

18 18 On judicial review in the Federal Circuit Court, Mr Singh's application was successful. The court book in that Court included, fortuitously, the s 375A certificate. The Federal Circuit Court concluded that the Tribunal was bound to inform Mr Singh of the existence of the certificate, and that it had denied him procedural fairness in failing to do so. The Court did not conclude that the particulars which were provided were inadequate, although it did discuss this issue. Again, it would, we think, have been difficult to assess the

adequacy of the particulars without examining the underlying material the subject of the certificate.

3. 3. The notice of appeal and the notice of contention

The Minister's notice of appeal contained four grounds of appeal. However, during the hearing of the appeal, it emerged that only grounds 1 and 3 were pressed. These were:

1. The Court below erred in holding that the Second Respondent (the **Tribunal**) denied the First Respondent procedural fairness, and thereby made a jurisdictional error, by not disclosing to the First Respondent that a delegate of the Appellant had issued a certificate under s 375A of the *Migration Act 1958* (Cth) (the **Act**).

...

3. Further and in the alternative to grounds one and two, the Court below erred in holding that s. 357A of the Act did not operate to displace any general law obligation of procedural fairness in so far as the Tribunal would otherwise have been obliged to disclose to the First Respondent that a delegate of the Appellant had issued a certificate issued under s. 375A of the Act.

(Emphasis in original.)

Against the possibility that the Minister's grounds of appeal might succeed, Mr Singh also sought to uphold the primary judge's conclusions on grounds not considered by his Honour, by relying upon a notice of contention which was filed at the hearing. Leaving aside the extensive particulars provided with them, the two grounds were:

1. That the decision of the Tribunal was affected by jurisdictional error because the First Respondent did not receive a fair and meaningful hearing as required by s 360(1) of the *Migration Act 1958* (Cth) (**the Act**), ...
2. The decision of the Tribunal is affected by jurisdictional error because the Tribunal did not comply with s 359A and/or s 360(1) of the Act.

(Emphasis in original.)

4. 4. Procedural fairness and s 375A

Grounds 1 and 3 of the Minister's notice of appeal raise issues about the operation of s 375A and its interaction with the rules of procedural fairness.

The primary judge concluded that there was an obligation of procedural fairness on the Tribunal to disclose the existence of the certificate. This was contrary to the conclusion

of Dowsett J in *Davis* that a s 375A certificate does not need to be disclosed to an applicant. At [29], Dowsett J said this:

29 ... It is rather submitted that the applicant ought to have been given the certificate at such a time as to allow her to make inquiries as to its validity prior to the Tribunal's decision. There is no statutory obligation to disclose the existence of the certificate to the applicant. In some cases disclosure may involve no adverse consequences. In others, disclosure may seriously undermine the confidentiality which s 375A was designed to protect. The existence of the certificate, by itself or coupled with questions asked by the Tribunal or matters raised by the Tribunal, may, in effect, disclose the confidential material. Given that the Tribunal may not override the certificate, no point would be served by disclosing its existence. In any event there is no reason to doubt that the delegation was lawful or effective. By the time of the hearing before me, the applicant, I infer, had access to the certificate and therefore an opportunity to discover any irregularity. None has been suggested. There is nothing in this point.

23 23 The reason the primary judge did not apply this statement was that his Honour believed that it had been overcome by the more recent decision of Beach J in *MZAFZ v Minister for Immigration and Border Protection* [2016] FCA 1081. That case was concerned with a certificate issued under s 438 of the Act, an analogous although not identical provision to s 375A. Section 438 provides:

438 Tribunal's discretion in relation to disclosure of certain information etc.

- (1) This section applies to a document or information if:
 - (a) the Minister has certified, in writing, that the disclosure of any matter contained in the document, or the disclosure of the information, would be contrary to the public interest for any reason specified in the certificate (other than a reason set out in paragraph 437(a) or (b)) that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the matter contained in the document, or the information, should not be disclosed; or
 - (b) the document, the matter contained in the document, or the information was given to the Minister, or to an officer of the Department, in confidence.
- (2) If, in compliance with a requirement of or under this Act, the Secretary gives to the Tribunal a document or information to which this section applies, the Secretary:
 - (a) must notify the Tribunal in writing that this section applies in relation to the document or information; and
 - (b) may give the Tribunal any written advice that the Secretary thinks relevant about the significance of the document or information.

- (3) If the Tribunal is given a document or information and is notified that this section applies in relation to it, the Tribunal:
 - (a) may, for the purpose of the exercise of its powers, have regard to any matter contained in the document, or to the information; and
 - (b) may, if the Tribunal thinks it appropriate to do so having regard to any advice given by the Secretary under subsection (2), disclose any matter contained in the document, or the information, to the applicant.
- (4) If the Tribunal discloses any matter to the applicant, under subsection (3), the Tribunal must give a direction under section 440 in relation to the information.

24 24 As the primary judge accepted, there are significant textual differences between s 375A and s 438. In particular, s 438(3)(b) permits what s 375A does not, *viz.*, disclosure to an applicant of the material subject to the certificate. Despite that difference, his Honour was attracted to the conclusion reached by Beach J that procedural fairness required a certificate under s 438 to be disclosed to an applicant for review before the Tribunal. In the course of reaching that conclusion, Beach J declined to follow what had been said about disclosure of a certificate under s 375A in *Davis* because *MZAFZ* was concerned with s 438 and not s 375A.

25 25 It will be necessary to return to both *Davis* and *MZAFZ* in more detail shortly. They nevertheless form part of the backdrop to the appeal. For now, having noted them, it is useful to outline the central thrust of the Minister's position on the appeal.

26 26 There were three steps in the Minister's submissions. First, regard needed to be had to s 357A of the Act, which is in these terms:

357A Exhaustive statement of natural justice hearing rule

- (1) This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.
- (2) Sections 375, 375A and 376 and Division 8A, in so far as they relate to this Division, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.
- (3) In applying this Division, the Tribunal must act in a way that is fair and just.

27 27 The Minister submitted that the effect of s 357A(2) was that s 375A was an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters with which it dealt. Section 375A was to be seen as dealing with the issue of the Minister's power to impose confidentiality restrictions on the Tribunal. It followed that s

375A was taken to be an exhaustive statement of the rule in relation to that topic. Since s 375A did not require that a certificate issued under it had to be disclosed to an applicant, this meant that no such obligation could be implied by means of the natural justice hearing rule.

28 28 Secondly, the Minister submitted that even if that were not the effect of s 375A, the existence of a certificate issued under it was not something which could, in any event, enliven an obligation of procedural fairness requiring the certificate's disclosure. The Tribunal had no power to determine that a certificate was invalid, and it would be unable to act in a fashion which had legal consequences upon any submission made by an applicant to it about a certificate's validity. In a real sense, the existence of the certificate was not something which affected an applicant's rights, interests or legitimate expectations.

29 29 Thirdly, said the Minister, reliance upon *MZAFZ* was misplaced because s 438 explicitly permitted the information subject to a certificate to be disclosed to an applicant which was not so under s 375A.

30 30 As to that last matter, Mr Singh accepted that the difference between s 375A and s 438 was a material one. But he denied that s 357A had the exhaustive effect for which the Minister contended. In particular, he submitted that s 357A(2) should be construed as simply narrowing whatever obligation the Tribunal would otherwise have had to disclose the document or information to which the certificate applied. On this view, s 357A(2) did not apply to any matter merely because it related to a s 375A certificate. Rather, one had to point to some aspect of s 375A which could be seen as a manifestation of a procedural fairness regime, and it would then only be in relation to that matter that s 375A would be an exhaustive statement.

31 31 The obligation to disclose the existence of a certificate was not, therefore, one of the matters with which s 375A dealt, and its exhaustive effect was not engaged. Accordingly, s 357A(2) did not have the effect of preventing an obligation arising to disclose a certificate issued under s 375A if such a duty would have arisen under ordinary principles.

32 32 As to the Minister's contention that such an obligation could not arise under ordinary principles, this was denied. The existence of the certificate was antithetical to Mr Singh's interests, and curtailed the very nature of the hearing which he was afforded. Further, the hearing which the Act guaranteed him was one which was 'real and meaningful' by reason of

s 360 of the Act. It was hardly a real or meaningful hearing if conducted on the basis of adverse information of which he was altogether unaware.

- 33 33 Mr Singh's submissions are to be preferred. There are four issues which arise:
- (a) the effect of s 357A(2) on the existence of a procedural fairness obligation;
 - (b) whether Mr Singh has a sufficient right, interest or legitimate expectation to give rise to an obligation of procedural fairness requiring the disclosure of the existence of a certificate or the certificate itself;
 - (c) the impact of the relationship between s 359A and s 375A on the content of any such duty; and
 - (d) whether a failure to disclose a certificate might result in a Tribunal review which was not real and meaningful.

34 34 It is useful to deal with these in the order set out above.

5. 5. The effect of s 357A(2) on the existence of a procedural fairness obligation

35 35 Section 357A is set out above. It is located in Part 5 of the Act which, broadly speaking, deals with review of most classes of visa apart from protection visas. The review of decisions concerned with protection visas is dealt with in Part 7. Both Parts 5 and 7 contain a provision dealing with the exhaustive nature of their provisions for the purposes of the natural justice hearing rule. In Part 5 the provision is s 357A itself. In Part 7 it is s 422B, which is in these terms:

422B Exhaustive statement of natural justice hearing rule

- (1) This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.
- (2) Sections 416, 437 and 438 and Division 7A, in so far as they relate to this Division, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.
- (3) In applying this Division, the Tribunal must act in a way that is fair and just.

36 36 It will be seen that ss 357A and 422B are very similar. Both were introduced into the Act by the *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth). For some time, the meaning of the words 'in relation to the matters it deals with' in subs (1) generated difficulty because it was quite unclear what they meant. The Full Court of this

Court described them as ambiguous or obscure in *Minister for Immigration and Multicultural and Indigenous Affairs v Lat* (2006) 151 FCR 214 at 225 [64]. Insofar as subs (1) is concerned, that ambiguity lies in the word ‘matters’. Does it refer to the general topic with which the division deals, i.e., Part 5 reviews in general, or does it refer instead to the individual elements in the division? The former view gives s 357A(1) a broad operation; the latter, a somewhat narrower one.

37 37 At the same time as ss 357A and 422B were introduced into Parts 5 and 7 respectively, a relevantly identical provision, s 51A, was introduced into Part 2. Although the High Court has not directly considered the proper construction of ss 357A or 422B, it did consider the proper construction of s 51A in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252. There it was held that s 51A(1) was to be construed in the narrow way discussed above (at 266 [38]-[42]). Because ss 51A(1) and 357A(1) (and s 422B(1)) are relevantly identical, this reasoning is inevitably to be applied to those provisions also. Consequently, s 357A(1) refers to the actual elements within the division.

38 38 This case is not concerned, however, with subs (1), but rather with subs (2) of these provisions. The wording of subs (1) and (2) is not identical, but once again the same interpretative choice arises between a narrow reading (about specific elements) and a broader reading (about Part 5 reviews generally). There is no reason, in our opinion, not to approach this question the same way in both subsections, that is to say, on the basis of *Saeed*.

39 39 In relation to s 422B(2), Beach J in *MZAFZ* came to the same conclusion, namely that the narrower reading was the preferable one (at [58]-[62]). In our opinion, he was correct to do so.

40 40 In the case of subs 357A(2), the effect of applying the reasoning of *Saeed* about s 51A(1) to subs 357A(2) is that s 375A will then be taken to be an exhaustive statement of the natural justice hearing rule in relation to the matters with which it deals, where it is understood that this is a reference to individual elements in s 375A. What are these? All that s 375A does in relation to the conduct of a review hearing is to prevent the information or documents subject to a certificate from being disclosed to the applicant. This is certainly a statement that procedural fairness does not require disclosure of the certified matter. That is a matter with which, within the meaning of s 357A(2), s 375A may be seen as dealing. But the provision says nothing about the processes leading to the issue of a certificate with which, analogously with the reasoning in *Saeed*, it may be said it does not therefore deal.

Consequently, as Beach J correctly concluded in *MZAFZ*, albeit in obiter, s 357A(2) is no impediment to Mr Singh's argument that general law notions of procedural fairness might require the disclosure of a certificate.

6. 6. Right, interest or legitimate expectation?

41 41 The conclusion that s 357A(2) does not stand in Mr Singh's path does not relieve him of the obligation to show that the rules of procedural fairness did, in fact, require disclosure of the certificate.

42 42 The effect of the certificate, if valid, is to require the Tribunal to conduct the review without disclosing the documents or information the subject of the certificate to an applicant. It is possible, as Wilcox J was inclined to think in *Burton* (at 31 [40]), that the Tribunal may be able to provide particulars of the confidential material sufficient to satisfy the requirements of s 359A whilst not infringing those of s 375A. But even where this occurs, the fact remains that the extent of an applicant's participation in the review is circumscribed by the existence of the certificate which, even with particulars, denies access to relevant material. In that sense, the certificate has the immediate effect of diminishing an applicant's entitlement to participate fully in the review process. That is a sufficient interest to enliven an obligation of procedural fairness.

43 43 Against this it might be said that provision to an applicant of a s 375A certificate would be pointless. Having received a certificate, what would an applicant then do? Could, for example, an applicant submit to the Tribunal that the certificate was invalid and should be ignored? Or would it be relevant for procedural fairness purposes that equipped with the certificate, an applicant might seek judicial review of the certificate?

44 44 The question whether the Tribunal may consider the validity of a certificate is capable of being looked at from a number of different perspectives. It may be, for example, that because the Tribunal is bound, in the course of exercising its statutory duty to review a decision, to consider the extent of its own jurisdiction (see *Re Adams and the Tax Agents' Board* (1976) 7 ATR 87 per Brennan J), this gives it a duty to consider the validity of a certificate under s 375A. On this view, the limits of its own jurisdiction might be partially delineated by the existence of the certificate. If so, it would follow that the validity of the certificate was something that the Tribunal not only could decide, but was bound to decide.

45 45 Another way of looking at the same problem might be to ask whether the certificate could be subject to a collateral challenge in Tribunal review proceedings. A rich jurisprudence attends the question of when a court or tribunal, not seized with judicial review proceedings, may treat an administrative act as nevertheless invalid. Within it reside difficult questions such as the role of the discretionary refusal of relief in such a context, along with the effect of time bars in judicial review proceedings. Largely, these questions appear to involve a close reading of the relevant statutory context and the ascertainment of legislative intent: cf *Federal Airports Corporation v Aerolineas Argentinas* (1997) 76 FCR 582 at 599 per Lehane J (Beaumont and Whitlam JJ agreeing).

46 46 There may be other ways that the problem may be approached. It is not necessary for the purposes of this appeal to enter upon these matters, which have not been argued before us. This is because, on the assumption that the Tribunal does have the authority to decide the issue of the certificate's validity, it is plain that it must disclose the certificate to an applicant to allow a submission to be made that the certificate is invalid. The existence of a s 375A certificate affects, in a material way, the Tribunal's procedural fairness obligations. Therefore, the issue affects the applicant's interests in the requisite sense, and the Tribunal can (on this hypothesis) act upon a submission going to invalidity.

47 47 On the other hand, if the Tribunal has no such jurisdiction, then the only way that an applicant may submit to the Tribunal that it ought not to give effect to a certificate would be by seeking judicial review of the certificate. The only feasible way that that course might be adopted would be by disclosing the certificate to an applicant to permit such a judicial review to occur.

48 48 It is not necessary to resort to constitutional principles to reach that result. However, it might be noted for completeness that any other conclusion would appear to immunise a decision to issue a certificate against any form of judicial review. Clear words indeed would be required for that conclusion, even assuming it reflects a constitutionally permissible aspiration.

49 49 In either case, there is real utility in disclosing the certificate from an applicant's point of view. To the extent that *Davis* suggests that disclosure would be pointless, we would respectfully differ.

On the assumption that the Tribunal could form its own view of the validity of the certificate, the Minister submitted that any such determination could not finally adjudge that issue, which could only be definitively determined by a court exercising judicial power. Consequently, no right, interest or legitimate expectation of an applicant could be affected by the Tribunal's conclusions about validity.

This submission is unpersuasive. The fact is the existence of the certificate has an immediate and adverse impact on an applicant's entitlement to participate in the hearing. To say that this has no consequence as a matter of legal theory is to overlook its substantial and immediate practical consequences. In any event, it is not necessary that Mr Singh show that a legal interest of his was impacted. An obligation to afford a person procedural fairness may be triggered by interests falling well short of legal rights. In *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 at 658 [66], Gummow, Hayne, Crennan and Bell JJ adopted with approval this statement by Brennan J in *Kioa v West* (1985) 159 CLR 550 at 616-617:

There are interests beyond legal rights that the legislature is presumed to intend to protect by the principles of natural justice. It is hardly to be thought that a modern legislature when it creates regimes for the regulation of social interests – licensing and permit systems, means of securing opportunities for acquiring legal rights, schemes for the provision of privileges and benefits at the discretion of Ministers or public officials – intends that the interests of individuals which do not amount to legal rights but which are affected by the myriad and complex powers conferred on the bureaucracy should be accorded less protection than legal rights.

Mr Singh therefore had a sufficient interest to give rise to an obligation to afford him procedural fairness upon the issue of the certificate. In this case, that obligation required the Tribunal to disclose to him the certificate which had been issued.

7. The relationship between s 359A and s 375A

In *Davis*, Dowsett J observed that in some circumstances the disclosure of the certificate might seriously undermine the confidentiality which s 375A was designed to protect. This is, with respect, a legitimate concern. In this case, however, it is apparent from the face of the certificate that this is not a problem, for its contents do not disclose the information in question. However, as is always the case, the requirements of procedural fairness vary with the circumstances: *Russell v Duke of Norfolk* [1949] 1 All E.R. 109 at 118 per Tucker LJ. In that regard, it is well established that confidentiality concerns, especially those relating to matters of public interest immunity, may have the effect of limiting the scope

of the hearing rule: *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at 100 [29].

54 54 It is not necessary for the purposes of this appeal to decide how such a narrowing of the hearing rule might be accommodated. But it is likely that even if the circumstances did warrant non-disclosure of the certificate itself, this would not mean that the existence of the certificate would not need to be disclosed. It is not, however, necessary to explore this further.

55 55 The above observations concern the interaction between s 375A and the general principles of procedural fairness. *Davis* is authority, however, for the proposition that s 375A has the effect of overriding the obligation of the Tribunal under s 359A to give an applicant particulars of information which the Tribunal might use adversely to the applicant. There is, as we have already noted, a tension between the two provisions, but they are not inevitably completely at loggerheads. As Wilcox J explained in *Burton*, in many cases it may be possible to serve the procedural fairness aims of s 359A without compromising the secrecy requirements of s 375A. Carefully drafted particulars may have the effect of providing a fair hearing without disclosing the confidential information. That said, this will not always be possible. In such cases, it is necessary to identify which of the two provisions is the leading provision and to give it primacy: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [70]ff.

56 56 It is plain that s 375A is the leading provision. In cases of true conflict it is s 375A, therefore, which will prevail. *Davis* likewise reflects an assumption that s 375A is the leading provision. To the extent, however, that *Davis* stands for the proposition that s 375A has the effect that s 359A never gives rise to an obligation to provide particulars about the document or information certified, we do not agree. Whilst direct conflict between ss 359A and 375A will result in the latter prevailing, it is by no means inevitable that the aims of both provisions cannot usually be served without conflict.

57 57 It is necessary to make this observation, because otherwise the reasoning in *Davis* would support the idea that s 375A prevents a more general obligation of procedural fairness from arising. As we have sought to show, this is not correct.

58 58 So too, for the reasons we have given, we do not regard the conclusion in *Davis* that there is no obligation to disclose the certificate to an applicant as correct. The argument that

his Honour rejected was an argument that an obligation to disclose the certificate arose under s 359A. Whilst that may well be so because the certificate itself (as opposed to the matter certified) is unlikely to be adverse information for the purposes of s 359A, it is not true of the more general obligation of procedural fairness which exists. In fairness to Dowsett J, the argument advanced to us on this appeal appears not to have been advanced to him in *Davis*.

To the extent that *Davis* is authority for the proposition that the Tribunal does not ordinarily need to disclose a certificate to an applicant, it should be overruled.

8. 8. Failure to afford Mr Singh a real and meaningful invitation to attend the hearing

Section 360 of the Act provides:

360 Tribunal must invite applicant to appear

- (1) The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.
- (2) Subsection (1) does not apply if:
 - (a) the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or
 - (b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it; or
 - (c) subsection 359C(1) or (2) applies to the applicant.
- (3) If any of the paragraphs in subsection (2) of this section apply, the applicant is not entitled to appear before the Tribunal.

Section 360 (which is, it will be recalled, in Part 5 of the Act) has an analogue in s 425 of Part 7 (which deals with protection visas). Section 425 has been held to require that the invitation it contemplates must be 'real and meaningful': *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* (2003) 128 FCR 553 at 561 [37].

Mr Singh submitted that if a certificate had been issued which was not disclosed to him, this would mean that the hearing invitation he received would not be to a real and meaningful review.

Thus, for example, in *SCAR* itself (at 561 [37]) it was said that statements made by the Tribunal before the hearing which misled an applicant about the issues likely to arise at the

hearing could have the effect of rendering the invitation to that hearing not real or meaningful (and hence in breach of s 425).

On the other hand, the reasoning in *SCAR* may not necessarily be apt where the difficulty arises from the operation of the Act itself, i.e., s 375A, rather than from some external misfortune (such as the infirmity of the applicant or the actions of the Tribunal). There are potentially difficult question here. Given that we have already concluded that an obligation to provide the certificate arose, there is no need for us to consider whether s 360 also had the same effect.

9. 9. The notice of contention

It will follow from the above conclusions that the appeal should be dismissed. This makes it unnecessary to deal with Mr Singh's notice of contention.

10. 10. Conclusions

To the extent we have indicated, *Davis* should be overruled. The appeal should be dismissed with costs. There are two final remarks which should be made.

First, the Minister initially sought to put before the Court the confidential information which was the subject of the certificate. For future cases, so that this material is not inadvertently seen by the Court prior to any debate as to whether it should be received, it should be provided manually in a sealed envelope with a clear statement on the front of it as to its contents. This will ensure that there is no premature disclosure of the material to the Court.

Secondly, no argument was advanced to us that the certificate was invalid. No doubt given the effect of a s 375A certificate, it is likely that a reasonably intense level of scrutiny will be applied to it. However, the fleshing out of those principles must await a case in which it is raised.

I certify that the preceding sixty-eight (68) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Kenny, Perram and Mortimer.

Associate:

Dated: 19 December 2016